FILED
FEB 5 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 07-668

IN THE

Supreme Court of the United States

JASON DANIEL TAYLOR,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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February 5, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF FOR THE PETITIONER

1. Although the government contends that "every circuit to have confronted the specific question presented here, whether a felony escape offense categorically constitutes a violent felony under the ACCA, has answered in the affirmative," BIO 6, it acknowledges that the Eleventh Circuit's decision in this case conflicts with the Sixth Circuit's decision in *United States v. Collier*, 493 F.3d 731 (6th Cir. 2007). It maintains only that petitioner's case "would be a particularly poor vehicle to address [the question presented] . . . because petitioner did not raise the issue in the district court or on direct appeal." BIO 7. That assertion is incorrect. The briefs and memoranda filed by both petitioner and the government make clear that the issue whether a failure-to-return escape is a "violent felony" for purposes of the ACCA was raised both in the district court and in the Eleventh Circuit. In the district court, for example, the sentencing memorandum submitted by petitioner noted that petitioner's Florida escape conviction "is thought to be the third 'crime of violence' for [petitioner's] classification as a 'armed career criminal,'" Def's Sent. Mem. 1 (Apr. 28, 2006), and asked the district court to "determine that he is not an Armed Career Criminal for sentencing purposes," *id.* at 3. The government's sentencing memorandum repeatedly reflected its understanding that the application of the ACCA is at issue: it argued, for example, that "cases interpreting 'crime of violence' pursuant to U.S.S.G. § 4B1.2 provide helpful guidance *in a case such as this* involving the interpretation of 'violent felony' pursuant to 18 U.S.C. § 924(e)," U.S. Sent. Mem. 3 (emphasis added), and

asked the district court to "find that [petitioner's] conviction for escape constitutes a violent felony for purposes of 18 U.S.C. § 924(e)," *id.* at 7; *see also id.* at 2 ("Other than an exception which applies regarding prior burglary convictions and which is not relevant here, '[i]n determining whether a particular offense falls within this definition [§ 924(e)(2)(B)'s definition of "violent felony"] the Supreme Court has directed trial courts to pursue a categorical approach . . . ."); *id.* at 7 ("[T]his Court should rule that defendant's prior escape conviction constituted a 'violent felony' pursuant to 18 U.S.C. § 924(e).").

The transcripts from the district court similarly reflect the understanding of both the district court and the government that the ACCA issue was properly before the court. In petitioner's initial sentencing hearing, the district court commented that "[t]he reason Congress adopted these provisions is to recognize that defendants who have engaged in violent conduct deserve to be treated differently in certain respects. Particularly, for example, in the 924(e) setting, it's someone who possesses a gun." R56-9-11, *reprinted in* Petr. C.A. Br. 6. Later, it added that "[s]omebody who has walked away from a work release and failed to turn themselves in, or somebody who has been sentenced and failed to turn themselves in is guilty of a felony and ought not to have a gun, but that situation probably doesn't present the same risk that Congress is dealing with in 924(e)." *Id.*, *reprinted in* Petr. C.A. Br. 6-7. And in the subsequent sentencing hearing, the government began its argument by outlining its "position . . . that analysis of what type of crime constitutes a crime of violence under section 924(e)

requires a categorical approach." Sent. Hrg. Trans. 2-3 (May 25, 2006).

Petitioner's submissions in the Eleventh Circuit, as well as the government's brief below, confirm that the issue was also raised in that court. Petitioner's opening brief below (at 6-7) quoted extensively from the district court's discussion of Section 924(e) and expressly urged the court (at 26) to hold "that prior Escape convictions which were based on a failure to return . . . do not qualify as a "crime of violence" under the Armed Career Criminal Act, 18 U.S.C. § 924(e), or U.S.S.G. § 4B1.2." And although the government argues in this Court for the first time (at 7-8) that the plain error rule applies, the government's brief below similarly made clear that both sides and the district court regarded the case as presenting the ACCA question: it stated the issue as "whether *United States v. Gay* should be limited to exclude a prior escape conviction based upon a failure to return to a halfway house from being a predicate offense for Armed Career Criminal Act purposes," U.S. C.A. Br. 1; contended that "[t]he district court did not err when it found that Defendant's escape involving his failure to return to a work release center is likewise a violent crime predicate under the Armed Career Criminal Act," *id.* at 5; and described petitioner's brief as arguing "that his conviction for escape should not be a predicate crime of violence under Title 18, United States Code, Section 924(e), the Armed Career Criminal Act," *id.* at 6.

The United States's further contention (BIO 8) that the decision below "does not conflict with the Ninth Circuit's decision in *United States v. Piccolo*,"

441 F.3d 1084 (2006), because that case dealt with the Sentencing Guidelines rather than the ACCA, is also unavailing. Although the government concedes that "some of *Piccolo*'s reasoning may suggest that the Ninth Circuit would hold that walkaway escapes are not violent felonies for purposes of the ACCA," it emphasizes that "to date the Ninth Circuit has not reached that question." *Id.* at 9. To be sure, the government is correct that the Ninth Circuit has not addressed the specific question presented by the petition, but the government offers no reason to believe that the Ninth Circuit would reach a different holding in cases involving the ACCA: as even the Eleventh Circuit acknowledged in this case, the definitions of "crime of violence" and "violent felony" are virtually identical, *see* Pet. App. 3a, and the courts of appeals have treated them interchangeably, including the Ninth Circuit in *Piccolo*, *see* 441 F.3d at 1089 (listing cases relying on *Taylor v. United States*, 495 U.S. 575 (1990), to hold "that any escape, however effected, categorically constitutes a crime of violence under the Sentencing Guidelines" and then noting that "[c]ourts have similarly applied *Taylor* in analogous circumstances to rule that an escape conviction qualifies as a 'violent felony' under the Armed Career Criminal Act"). *See also* Pet. App. 5a n.4 (Hill, J., concurring *dubitante*) (noting that, "[a]s the panel opinion observes, the courts uniformly treat 'crimes of violence' under the Guidelines and 'violent felonies' under the ACCA the same"). Indeed, in this case the government itself has argued that the reasoning underlying the categorical treatment of escapes as "crimes of violence" for purposes of the Sentencing Guidelines should apply fully to ACCA cases. *See* U.S. Sent. Mem. 3 (explaining that "cases

interpreting 'crime of violence' pursuant to U.S.S.G. § 4B1.2 provide helpful guidance in a case such as this involving the interpretation of 'violent felony' pursuant to 18 U.S.C. § 924(e) 'because the definitions for both terms are virtually identical'"); *see also* U.S. C.A. Br. 10 (arguing without additional analysis that Eleventh Circuit's decision in *Gay*, addressing "career offender" status under Sentencing Guidelines, "should be extended to categorize escape based upon a failure to return as a violent felony for ACCA purposes").

2. The government's contention that a failure-to-return escape is categorically a violent felony for purposes of the ACCA lacks merit. First, as Judge Posner noted in *United States v. Chambers*, 473 F.3d 724, 727 (7th Cir. 2007), *petition for cert. pending*, No. 06-11206 (filed May 8, 2006), almost ninety percent of all escapes from U.S. prisons are walkaways. Thus (and again as Judge Posner explained in *Chambers*), "if courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of walkaways could well compel a conclusion that escape is never a crime of violence." *Id.*; *see also* BIO 4 ("[T]he proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." (quoting *James v. United States*, 127 S. Ct. 1586, 1597 (2007)). Second, the government's fall-back argument – that the recapture of a prisoner (such as petitioner) who escaped by leaving a work-release program with authorization but then failed to return to custody "gives rise to a serious potential risk of physical injury, even if that risk does not ripen into actual

violence," is pure "conjecture floating well free of any facts." *Chambers*, 473 F.3d at 727.

3. The government's final argument – viz., that certiorari should be denied because this Court has denied other petitions presenting the same question – also falls short. As the petition explained (at 10-11), and the government does not dispute, this case presents an important and recurring question of law: petitioner is aware of at least six other petitions for certiorari that have been filed in the seven months since this Court denied certiorari in *Brooks v. United States*, 127 S. Ct. 3003 (2007) (No. 06-9681). *See Golden v. United States*, *petition for cert. pending*, No. 06-10751 (filed Apr. 9, 2007), *Chambers v. United States*, *petition for cert. pending*, No. 06-11206 (filed May 8. 2006), *Mathias v. United States*, *petition for cert. pending*, No. 07-61 (filed July 12, 2007), *Lancaster v. United States*, *petition for cert. pending*, No. 07-7987 (filed Nov. 29, 2007), *Thomas v. United States*, *petition for cert. pending*, No. 07-5209 (filed July 9, 2007), *Mills v. United States*, *petition for cert. pending*, No. 07-5354 (filed July 13, 2007). And the government notably also does not dispute either that no further percolation of the issue is necessary or that only this Court can resolve the conflict of authority.

At a minimum, however, this Court should – as the United States concedes – hold this case pending its decision in *Begay v. United States*, *cert. granted*, No. 06-11543 (Sept. 25, 2007).

CONCLUSION

For the foregoing reasons, as well as the reasons outlined in the petition, the petition for a

writ of certiorari should be granted. Alternatively, this Court should either hold this petition pending its disposition of the petitions for certiorari in Nos. 06-10751, *Golden v. United States*, 06-11206, *Chambers v. United States*, 07-61, *Mathias v. United States*, 07-5209, *Thomas v. United States*, 07-5354, *Mills v. United States*, and 07-7987, *Lancaster v. United States*, and/or hold the petition pending its decision in *Begay v. United States*, *cert. granted*, No. 06-11543 (Sept. 25, 2007).

Respectfully submitted,

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